Nestier, Division of Buckhorn, Inc. *and* Miscellaneous Warehousemen, Drivers & Helpers Local 986, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America. Case 21-CA-21749

9 June 1983

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

Upon a charge filed on 10 November 1982 by Miscellaneous Warehousemen, Drivers & Helpers Local 986, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, herein called the Union, and duly served on Nestier, Division of Buckhorn, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 21, issued a complaint on 30 November 1982 against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and the complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on 22 October 1982, following a Board election in Case 21-RC-16971, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about 11 May 1982, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On 20 December 1982 Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On 27 January 1983 counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on 28 January 1983 the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint Respondent admits the Union's requests for bargaining and its refusal to bargain, but attacks the Union's certification in the underlying representation proceeding. Respondent contends in both the answer to the complaint and response to the Notice To Show Cause that the election was improperly conducted. Respondent alleges that, because the Board failed to provide a Spanish-speaking Board agent, the union observer interpreted voting instructions to employees, and thereby destroyed laboratory conditions necessary for a fair election. Although Respondent filed no exception to the Regional Director's recommendation to overrule its objection alleging that an employee spoke in Spanish to other employees waiting to vote, Respondent renews this objection in its answer to the Notice To Show Cause. It now asserts that employees waiting in line to vote were told in Spanish to vote for the Union or that an immigration check would ensue and that they would lose their jobs because they did not have green cards. Respondent states that as a result of this information it examined the immigration status of its employees and has determined that the majority of them did not have valid green cards and, therefore, were not eligible voters within the meaning of the Act.

Review of the record herein, including the record in Case 21-RC-16971, reveals that an election was conducted on 30 April 1982 in the unit agreed to be appropriate which resulted in a tally of 22 votes for, and 4 votes against, the Petitioner, with 5 challenged ballots. On 7 May 1982 Respondent filed objections to conduct affecting the results of the representation election alleging, *inter alia*, that the election should be set aside because the Board failed to provide a Spanish-speaking agent, a Spanish-speaking union observer instructed voters, and an employee spoke in Spanish to employees who were waiting to vote. On 6 August 1982 the Regional Director for Region 21 issued his Report on Objections, recommending that all of Respondent's objections be overruled. On 18 August 1982 Respondent filed with the Board exceptions to the Regional Director's Report on Objections reiterating its objection to the Board's fail-

[1] Official notice is taken of the record in the representation proceeding, Case 21-RC-16971, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

ure to provide a Spanish-speaking Board agent and to the Union's Spanish-speaking observer instructing the voters. On 22 October 1982 the Board issued its Decision and Certification of Representative, certifying the Union as the exclusive bargaining agent.

As noted in its answer to the complaint and its opposition to the Motion for Summary Judgment, Respondent does not deny the essential elements of its refusal to bargain but attacks the Union's certification in the underlying representation proceeding. In so doing, Respondent renews an objection concerning an employee's conversation with employees who were waiting to vote. While Respondent did not except to the Regional Director's recommendation to overrule this objection, Respondent now asserts that it has discovered the content of the employee's conversation—a threat to cause an immigration check if the employees did not vote for the Union. Respondent further asserts that in light of this new evidence it conducted a check on its employees' immigration status and discovered that the majority of them did not have valid green cards and thus were not eligible voters.

It appears that, with the exception of the allegations made in connection with the renewed objection, Respondent is attempting in this proceeding to relitigate issues fully litigated and determined in the representation proceeding.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[2]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. In this regard, we find nothing to indicate that the alleged content of the employee's conversation with prospective voters or the immigration status of the voters was not previously available or constituted newly discovered evidence.[3] We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.[4]

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is a corporation engaged in the manufacture of shelving products with a facility located at 1901 El Segundo Boulevard in Compton, California. In the course and conduct of its business operations at this location, Respondent annually purchases and receives goods and products valued in excess of $50,000 directly from suppliers located outside the State of California.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Miscellaneous Warehousemen, Drivers & Helpers Local 986, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All production and maintenance employees, shipping and receiving employees, warehousemen and truckdrivers employed by Nestier, Division of Buckhorn, Inc., at its facility located at 1901 El Segundo Boulevard, Compton, California; excluding all other employees, guards and supervisors as defined in the Act.

2. The certification

On 30 April 1982 a majority of the employees of Respondent in said unit, in a secret-ballot election

[2] See *Pittsburgh Plate Glass v. NLRB*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

[3] Moreover, assuming *arguendo* that Respondent had established in the representation proceeding that the majority of voters were illegal aliens, the certification of the Union would not have been affected, as immigration status is not a consideration in determining the eligibility of employees to vote in a Board-conducted election. See *Amay's Bakery & Noodle Co.*, 227 NLRB 214 (1976), and cases cited therein at fn. 3.

[4] Member Hunter notes he was not on the panel in the underlying representation proceeding but he accepts the result reached there for institutional reasons. Accordingly, he joins in granting the Motion for Summary Judgment.

conducted under the supervision of the Regional Director for Region 21, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on 22 October 1982 and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about 11 May 1982, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about 11 May 1982, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since 11 May 1982, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Nestier, Division of Buckhorn, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Miscellaneous Warehousemen, Drivers & Helpers Local 986, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees, shipping and receiving employees, warehousemen and truckdrivers employed by Nestier, Division of Buckhorn, Inc., at its facility located at 1901 El Segundo Boulevard, Compton, California; excluding all other employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since 22 October 1982 the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about 11 May 1982, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Nestier, Division of Buckhorn, Inc., Compton, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Miscellaneous Warehousemen, Drivers & Helpers Local 986, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All production and maintenance employees, shipping and receiving employees, warehousemen and truckdrivers employed by Nestier, Division of Buckhorn, Inc., at its facility located at 1901 El Segundo Boulevard, Compton, California; excluding all other employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its facility at 1901 El Segundo Boulevard, Compton, California, copies of the attached notice marked "Appendix."[5] Copies of said notice, on forms provided by the Regional Director for Region 21, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 21, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

[5] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Miscellaneous Warehousemen, Drivers & Helpers Local 986, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All production and maintenance employees, shipping and receiving employees, warehousemen and truckdrivers employed by Nestier, Division of Buckhorn, Inc., at its facility located at 1901 El Segundo Boulevard, Compton, California; excluding all other employees, guards and supervisors as defined in the Act.

NESTIER, DIVISION OF BUCKHORN, INC.